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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 479

[illegible]

Petitioner,

vs.

[illegible] PUBLISHING CO., et al.,

Respondents.

MOTION TO DISMISS OR AFFIRM
OR PETITION FOR CERTIORARI

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of Counsel.

[illegible]

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In the Supreme Court of the United States

OCTOBER TERM, 1960.

No. _____.

ADOLPH HOHENSEE,

Petitioner,

vs.

AKRON BEACON JOURNAL PUBLISHING CO., *et al.*,

Respondents.

RESPONDENTS' BRIEF OPPOSING PETITION FOR CERTIORARI.

The appellees herein respectfully request that this Court deny the petition of the petitioner herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

RESPONDENTS' STATEMENT OF QUESTIONS PRESENTED.

1. Did the Complaint or the Proffered Amended Complaint state facts sufficient to state a cause of action under the Anti-Trust Laws?

2. Even if the Complaint or the Proffered Amended Complaint were well pleaded, did they contain such allegations which constituted a violation of the Anti-Trust Laws?

Both of the Courts below answered the foregoing questions "No."

STATEMENT OF FACTS.

The opinion of the Court of Appeals for the Sixth Circuit reported at 227 F. 2d 359 was a per curiam opinion wherein the Court affirmed the decisions of the District Court, which decisions are reported in 171 F. Supp. 90 and 174 F. Supp. 450. The crux of the decisions both of the Court of Appeals and the District Court was that the Complaint and the Proffered Amended Complaint failed to state facts sufficient to state a cause of action under the Anti-Trust Laws and further that even if the pleadings of the complainant were proper, they would not state a violation of the Anti-Trust Laws.

ARGUMENT.

I. THE PETITIONER CANNOT CLAIM ERROR UNDER RULE 15 (a) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

The petitioner chose to file a motion with the District Court requesting that his Proffered Amended Complaint be filed. The fact that the petitioner chose to file this motion rather than merely filing his Amended Complaint to which defendants would have filed a motion to dismiss, is of no consequence at this time. Both the District Court and the Court of Appeals found that, as a matter of fact, the Amended Complaint was as defective as the original complaint, and failed to state a cause of action. The issue as to whether the District Court should have ruled as the validity of the Amended Complaint upon the motion of the petitioner or on a motion of the defendant to dismiss such complaint should not be raised at this time since the petitioner chose to request a ruling of the District Court prior to filing his Amended Complaint. Moreover, petitioner has never raised this issue until the present time.

II. THE COURTS BELOW PROPERLY RULED THAT NEITHER THE COMPLAINT NOR THE AMENDED COMPLAINT SET FORTH FACTS SUFFICIENT TO STATE A CAUSE OF ACTION OR SET FORTH ALLEGATIONS WHICH SHOWED A VIOLATION OF THE ANTI-TRUST LAWS.

The petitioner's complaint and amended complaint do not allege facts sufficient to state a violation of the Anti-Trust laws.

It is the basic principle of law that a court will not consider legal conclusions in determining whether a pleading is sufficient to state a cause of action. Petitioner's entire complaint is a combination of numerous generalized allegations that there is, or has existed, a conspiracy among the appellees; that the conspiracy is injurious to him and in restraint of interstate commerce. The entire complaint of the petitioner is devoid of any specific facts which indicate a conspiracy. But one fact is alleged in the entire Amended Complaint, and that is, the appellee, W. J. Hine, threatened to throw appellant out of Canton, Ohio. (Paragraph 5, Amended Complaint.) In addition, petitioner alleges in his Amended Complaint that there were numerous acts of harassment and embarrassment caused to him by the appellees herein. The Amended Complaint states that the appellees "Did slander and cause certain libelous articles to be printed and circulated * * *" (Paragraph 6, Amended Complaint). Are such actions prohibited by the Anti-Trust Laws? Complainant actually has alleged nothing more than that the appellees have been guilty of certain torts, but even in attempting to allege such torts he has failed to allege any facts that would constitute a tort. It is therefore submitted that there are not sufficient facts alleged in either the original complaint or the Amended Complaint of the appellant, which, taken to-

gether, would constitute a cause of action against the appellees under the Anti-Trust Laws.

As stated on page 231, in *Black and Yates vs. Mahogany Association*, 129 F. 2d 227 (3rd Cir., 1941). Certiorari denied, 317 U. S. 672:

> "A general allegation of conspiracy without a statement of facts is an allegation of a legal conclusion and insufficient of itself to constitute a cause of action. Although detail is unnecessary, the plaintiff must plead facts constituting a conspiracy, its object and accomplishment."

In *Glenn Coal Company vs. Dickerson Fuel Company*, 72 F. 2d 885, the Court said the following at 887:

> "Thus it has been held in numerous federal decisions that in a civil suit under this special Act the declaration must allege facts from which the court can determine that there has been a violation of the Act with resultant damage proximately caused thereby to the plaintiff. In Alexander Milburn Co. v. Union Carbide & Carbon Corp. (C. C. A. 4) 15 F. (2d) 678, 680 (certiorari denied, 273 U. S. 757, 47 S. Ct. 459, 71 L. Ed. 876) this Court, by Judge Parker, said:
>
> 'For it is not sufficient that the declaration be framed in the words of the statute, or that it allege mere conclusions of the pleader. It must describe with definiteness and certainty the combination or conspiracy relied on, as well as the acts done which resulted in damage to plaintiff, and in doing so must set forth the substance of the agreement in restraint of trade, or the plan or scheme of the conspiracy or the facts constituting the attempt to monopolize. 1 R. C. L. 87; Cilley v. United Shoe Mach. Co. (C. C.) 152 F. 726; Rice v. Standard Oil Co. (C. C.) 134 F. 464.'"

As pointed out by the Court below, at 71 F. Supp. 92, the law is settled that an Anti-Trust complaint must be in

some degree specific and detailed. See *Bain and Black, Inc. vs. Warren Connelly Co.* 19 F. R. D. 108 (D. C. S. D. N. Y., 1956); *Bader vs. Zurich General Accident and Liability Insurance Co.* 12 F. R. D. 437 (D. C. S. D. N. Y., 1956); *Chas. Rubenstein, Inc. vs. Columbia Picture Corp.* 14 F. R. D. 401 (D. C. Minn., 1953).

Even if the allegations of the petitioner's complaint and proffered amended complaint were properly pleaded, the complaint or amended complaint did not state a violation of the anti-trust laws.

All of the cases cited by the petitioner in support of his petition for a writ of certiorari miss the point which the Courts below attempted to make clear in their decisions. All of the cases cited by the petitioner are cases wherein the Courts have held that a private individual is entitled to relief where he is injured by reason of a combination or conspiracy prohibited by the Anti-Trust Laws. The Courts below have not attempted to hold that a private individual does not have a right of action where there is a violation of the Anti-Trust Laws and that particular individual is injured thereby. The point which the Courts below attempted to make and which the petitioner seems to have misunderstood is that the Complaint and the Amended Complaint did not state a violation of the Anti-Trust Laws. The petitioner has alleged by conclusions, but no facts, that he was injured and further alleged that there was conspiracy, but the conspiracy which he was complaining of was not of the type which the Anti-Trust Laws were meant to prevent. The policy of these laws is basically economic and the purpose of the law is to defeat those practices harmful to the public which naturally result from free competition when businesses attempt to gain advantage over one another. The District Court below in its decision

at 174 F. Supp. 450 quoted *Apex Hosiery Co. v. Leader*, 310 U. S. 469, at 500:

> "* * * this Court has not departed from the conception of the Sherman Act as affording a remedy, public and private, for the public wrongs which flow from restraints of trade in the common law sense, i. e., restriction or suppression of commercial competition. In the cases considered by this Court since the *Standard Oil* case in 1911 some form of restraint of commercial competition has been the *sine qua non* for the condemnation of contracts, combinations or conspiracies under the Sherman Act, and in general restraints upon competition have been condemned only when their purpose or effect was to raise or fix the market price. (Citations.) It is in this sense that it is said that the restraints, actual or intended, prohibited by the Sherman Act are only those which are so substantial as to affect market prices. Restraints on competition or on the course of trade in the merchandising of articles moving in interstate commerce are not enough, unless the restraint is shown to have or intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition. (Citations.)

The fact is that the complaint does not allege or attempt that the appellees have done that is prohibited by the Anti-Trust laws. The following quotation from *Shockley v. General Electric*, 171 F. 2d 238, at 239 (10th Cir. 1948) is equally applicable to the case at bar:

> "And it further alleged in equally general terminology that the effect of such refusal to furnish parts to plaintiff was substantially to lessen competition and to create a monopoly. But these were general allegations in the nature of conclusions, without any statement of specific acts on the part of the defendants from which it could be determined as a matter of law in

the defendants did in fact violate the Act with resulting damages to plaintiff. The complaint did not allege that the defendants combined and conspired to refrain from competing with each other in the manufacture, sale and distribution of the enumerated commodities. It did not allege that the defendants conspired to raise prices. It did not charge that they combined to divide trade territory. It failed to allege that they conspired to apportion customers. It did not aver that they agreed to furnish the public commodities of inferior quality. And it was barren of any charge that the defendants engaged in any trade practices of that kind in furtherance of a combination or conspiracy. While it was alleged that the refusal to furnish merchandise to plaintiff for sale in connection with the conduct of his business was in furtherance of the conspiracy and that the public was injured, it was not charged generally or specifically that as the result of that refusal the prices of such merchandise were enhanced or that the volume thereof in the competitive markets was diminished. In other words, the complaint failed to allege facts from which it could be determined as a matter of law that a combination or conspiracy was entered into which brought about an increase in prices to the consuming public, a diminution in the volume of merchandise in the competitive markets, a deterioration in the quality of the merchandise available in the channels of commerce, or any other like evil consequence in the free flow of interstate commerce. Instead, the pleading bore clear internal indications of a personal grievance on the part of plaintiff.

Indeed, neither the Complaint nor the Amended Complaint indicate any business motive whatsoever for the alleged conspiracy. The petitioner does not even pretend to contend that the appellees combined to obtain a profit for themselves at the expense of the public, or for that matter, at the expense of the petitioner. It would seem clear that the Anti-Trust Laws were not meant to protect individuals

from any and all conspiracies, but were meant to protect them from those conspiracies prohibited by the Anti-Trust Laws such as price fixing, monopolies, combinations to eliminate competition and numerous others which have been developed by the ingenious imaginations of businessmen.

Particularly pertinent to this case is the following quotation from *Feddersen Motors vs. Ward*, 180 F. 2d 513, 522 (10th Cir., 1950):

> "No facts were alleged from which it could be determined as a matter of law that the contemplated purpose, tendency or inherent nature or result of the conspiracy was that fewer automobiles moved in Interstate Commerce from Detroit, Michigan, into Colorado or other destinations, or that less Hudson automobiles were available for purchase in the market either in Colorado or elsewhere; or that the quality of the Hudson cars was lowered in any manner. The pleading was completely barren of any allegations from which it could be determined as a matter of law that the contemplated purpose, tendency, inherent nature or result of the combination was to bring about any diminution in quantity or deterioration in quality of new Hudson automobiles moving in inter-state commerce and sold to the public. Facts were alleged which tended to show that the conspiracy as contemplated and effectuated harmed plaintiff. But that was not enough. In addition it was essential that the pleading allege facts from which it could be determined as a matter of law that the conspiracy contemplated or tended to restrain interstate commerce with harmful effect to the public interest."

From the above case and those other cases cited by these appellees, it is apparent that the Anti-Trust Laws were enacted for the purpose of preventing economic and

business combinations and conspiracies and not combinations or conspiracies to commit torts against an individual

III. THE PETITIONER HAS FAILED TO INCLUDE IN HIS APPENDIX THE STATUTES INVOLVED IN THIS CASE AS IS NECESSARY UNDER RULE 23(d) OF THE SUPREME COURT RULES.

Rule 23 (d) of the Supreme Court Rules requires a petitioner to include in his Appendix a full quotation of the statute involved in the case. Since petitioner failed to comply with this rule, his petition should be denied.

CONCLUSION.

For the foregoing reasons, it is submitted that the Amended Complaint which incorporates the original complaint fails to state facts which constitute a cause of action under the Anti-Trust Laws and further, even if the legal conclusions alleged by the appellant were acceptable, the Amended Complaint would be inadequate to state a cause of action under the Anti-Trust Laws for the reason that they are based on a misapprehension of the intent and purpose of those laws. It is therefore prayed that the petition herein be dismissed.

Respectfully submitted,

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